

DEC 28 1983

NO. 82-1795

ALEXANDER L. STEVENS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., ET AL.,

Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Writ of Certiorari to the
United States Court Of Appeals
For the Tenth CircuitBRIEF OF S.A.N.E., INC.
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

Larry Derryberry

DERRYBERRY DUNCAN GRAY & QUIGLEY
4420 N. Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 424-5535

Counsel for S.A.N.E., Inc.

December 28, 1983

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE TWENTY-FIRST AMENDMENT AND OKLAHOMA'S SPECIAL CONCERN FOR THE HEALTH AND WELFARE OF ITS RESIDENTS, PROVIDES A SUFFICIENT BASIS AND VALID REASON FOR UPHOLDING OKLAHOMA'S BAN ON THE IN-STATE RETRANSMISSION OF VIDEO PROGRAMMING WHICH CONTAINS ADVERTISEMENTS FOR ALCOHOLIC BEV- ERAGES.	
A. ALCOHOLIC BEVERAGE ADVERTISING AND ITS ATTENDANT EFFECT ON ALCO- HOL CONSUMPTION AND ABUSE PRE- SENTS A HEALTH HAZARD WHICH OKLA- HOMA HAS RIGHTFULLY SOUGHT TO PRE- VENT	3
B. OKLAHOMA'S BAN ON THE RETRANS- MISSION BY CABLE OF ALCOHOL ADVER- TISING SHOULD PREVAIL WHEN TWEN- TY-FIRST AMENDMENT CONSIDERATIONS ARE WEIGHED AGAINST FIRST AMEND- MENT AND SUPREMACY CLAUSE ISSUES.	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	
California v. LaRue, 409 U.S. 109, 114 (1972) -----	6,7
California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 107 (1980) -----	7
Craig v. Boren, 429 U.S. 190 (1976) -----	7
Doran v. Salem Inn, Inc. 422 U.S. 922 (1975) -----	7
Larkin v. Grendel's Den, Inc., ____ U.S. ____, 103 S. Ct. 505 (1982) -----	6,7
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) -----	7
State v. Journal Co., 25 Okl. 180, 105 P. 655 (1910) -----	4
State ex rel West v. State Capital Co., 24 Okl. 252, 103 P. 1021 (1909) -----	4
Wisconsin v. Constantineau, 400 U.S. 433 (1971) -----	7
Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138, 139 (1939) -----	6
 Constitutional Provisions:	
U.S. Constitution, Amendment I -----	Passim
U.S. Constitution, Amendment XXI -----	Passim
U.S. Constitution, Supremacy Clause -----	Passim
U.S. Constitution, Article VI, cl. 2 -----	7
Constitution of the State of Oklahoma, Article 1, §7 -----	3,4
Constitution of the State of Oklahoma, Article 27, §1 -----	4
Constitution of the State of Oklahoma, Article 27, §2 -----	4
Constitution of the State of Oklahoma, Article 27, §4 -----	4
Constitution of the State of Oklahoma, Article 27, §5 -----	3
Constitution of the State of Oklahoma, Article 27, §6 -----	4
Constitution of the State of Oklahoma, Article 27, §1-11 -----	3

	Page
Statutory Provisions:	
17 U.S.C. 111 (c) (3) (1982) -----	8
17 U.S.C. 111 (e) (3) (1982) -----	7
47 U.S.C. §115 (a) (1982) -----	7
37 Okla. Stat. tit. 37, §163.1 (1981) -----	4
37 Okla. Stat. tit. 37, §501 (1981) -----	4
Regulations:	
47 C.F.R. §76.57 -----	8
47 C.F.R. §76.59 -----	8
47 C.F.R. §76.61 -----	8
Publications:	
<i>The Booze Merchants</i> , Michael Jacobson, George Hacker, and Robert Atkins, CSPI Books, Washington, D. C. -----	4,5,6
<i>Impact</i> , January 15, 1983 -----	5
“Creating a Mass Market for Wine.”, <i>Business Week</i> March 15, 1983 -----	5
<i>The Wine Marking Handbook</i> , Gavin-Jobson Associates, 1979, New York, New York -----	5
“Intoxicating Liquors in Oklahoma”, William R. Bandy, 37-38 -----	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

NO. 82-1795

**CAPITAL CITIES CABLE, INC.; COX CABLE OF
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.;
and SAMMONS COMMUNICATIONS, INC.,**

Petitioners,

v.

**RICHARD A. CRISP, DIRECTOR
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD.**

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit**

**BRIEF OF S.A.N.E., INC.
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

S.A.N.E., Inc., respectfully submits its brief amicus curiae in support of the Respondent. Pursuant to the rules of this Court, amicus has obtained and filed the written consents of each of the parties to the filing of this brief.

INTEREST OF AMICUS CURIAE

This Amicus brief has been submitted by S.A.N.E., Inc., a non-profit corporation organized to publicly combat the use and abuse of alcohol and illegal drugs by the people of the State of Oklahoma. S.A.N.E., has been organized and operating since January 15, 1960. S.A.N.E. is governed by a Board of Directors composed of responsible, leading citizens of the State of Oklahoma and is financed

by private contributions of citizens and organizations that support its goals.

Amicus believes that the issues presented before this Court will have a profound effect on the personal and social well-being of the people of the State of Oklahoma. Social problems resulting from the use and abuse of alcoholic beverages have been documented for decades. This country has wrestled with the problems of alcohol abuse on a national scale, and the states have faced similar responsibilities. Amicus' interest in the cause results from a conviction that the advertising of alcoholic beverages in Oklahoma is contrary to the public interest and welfare. Further, Amicus is convinced that the compelling state interest achieved by the advertising ban should be preserved for the well-being of our citizens.

Amicus requests this Court to uphold the constitutionality of the law in question.

SUMMARY OF ARGUMENT

Since achieving Statehood in 1907, Oklahomans have had a special concern for the problems resulting from the consumption of alcoholic beverages. This concern has been shown by the fact that from 1907 to 1959 the sale of intoxicating liquors was illegal and remained so in the face of repeated attempts at legalization. The advertising of intoxicating liquors was also illegal. In 1959 when the people of the State voted to allow the sale of alcoholic beverages, the ban on advertising was written into the new constitutional provision.

It has always been the belief of the people, as evidenced by their laws, that advertising leads to increased consumption. This fact has been established by recent studies. Furthermore, there is a positive correlation between increased consumption and increases in the well-known problems which result from alcohol use. This Court has recognized that "wide latitude" has been afforded the States in exercising their regulatory powers under the Twenty-first Amendment. This regulatory power "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." Oklahoma's ban on advertising should withstand a constitutional challenge based on the Supremacy Clause and First Amendment considerations because it is regulation supported by the Twenty-first Amendment and because when balanced against the other constitu-

tional interests presented by this case, public policy considerations dictate that it prevail.

Although First Amendment and Supremacy Clause considerations exist in the case most impediments to deletion of the advertising are economic or arise from economic considerations. The petitioners claim that deletion of the alcohol advertising would interfere with the First Amendment is not persuasive. It has never been established that it is technologically impossible to delete alcohol advertisements. Neither has it been established that the cable companies would suffer a real burden in comparison to the burden which would be placed on the State through increased alcohol consumption.

We urge that the decision by the Appeals Court be upheld.

ARGUMENT

THE TWENTY-FIRST AMENDMENT AND OKLAHOMA'S SPECIAL CONCERN FOR THE HEALTH AND WELFARE OF ITS RESIDENTS, PROVIDES A SUFFICIENT BASIS AND VALID REASON FOR UPHOLDING OKLAHOMA'S BAN ON THE IN-STATE RE-TRANSMISSION OF VIDEO PROGRAMMING WHICH CONTAINS ADVERTISEMENTS FOR ALCOHOLIC BEVERAGES.

A. ALCOHOLIC BEVERAGE ADVERTISING AND ITS ATTENDANT EFFECT ON ALCOHOL CONSUMPTION AND ABUSE PRESENTS A HEALTH HAZARD WHICH OKLAHOMA HAS RIGHTFULLY SOUGHT TO PREVENT.

Oklahoma's current ban on the advertisement of alcoholic beverages¹ came into existence in 1959² by a vote of the people, which also lifted Oklahoma's prohibition on the sale of intoxicating liquors.³ Advertisements for the sale of intoxicating liquor had how-

¹ Okla. Const. Art. 27, §5

² "Article XXVII, Oklahoma Alcoholic Beverage Control Board, consisting of §§1 to 11, was adopted at election held April 7, 1959 (State Question No. 386, Referendum Petition No. 121), as proposed by Laws 1959, p. 479." Okl. Stat. Anno. 1951, p. 556.

³ Okl. Const. Art. 1, §7.

ever, been illegal prior to 1959.⁴ Inclusion of the ban on advertising was no doubt the result of certain compromises realistically required to obtain passage of the State Question.⁵ The new constitutional provision in 1959 reflected Oklahoma's desire to permit the sale and consumption of alcoholic beverages, but at the same time to prevent and discourage activity which would promote consumption. Sales of alcoholic beverages by the drink were prohibited. Okl. Const. Art. 27, §4. Sales of alcoholic beverages on Sundays, election days and certain holidays were prohibited. Okl. Const. Art. 27, §6. And a regulatory distinction was made between beer containing not more than three and two-tenths percent alcohol by weight and that containing a greater amount. Okl. Const. Art. 27, §2. See also 37 O.S. 1981 §163.1 Oklahoma's new constitutional provisions in 1959 were clearly aimed toward preventing the same abuses prohibition had previously sought to ban while allowing sale and consumption under very limited circumstances.

Today, however, the argument is advanced that alcoholic beverages, because they are legally sold and consumed in Oklahoma, should be advertised where that advertisement is one originating outside the State and picked up for retransmission by a cable television company operating within the State. Those advancing this argument have nevertheless, understandably ignored the severe impact televised advertising of alcoholic beverages would have on this State.

The advertising of alcoholic beverages has been directly related to consumption and consumption in turn to abuse.⁶ Advertising has been found to increase consumption by as much as ten percent,

⁴ *State v. Journal Co.*, 25 Okl. 150, 105 P. 655 (1910); *State ex rel West v. State Capital Co.*, 24 Okl. 252, 103 P.1021 (1909).

⁵ This is indicated by the fact that several amendments to Oklahoma's Constitution, Art. 1, §7, had been submitted to the people and rejected. See, William R. Bandy, *Intoxicating Liquors in Oklahoma*, 37-38, Okl. Stat. Anno. 1 at 4. Further evidence of compromise is seen in the fact that the amendment which successfully passed, Art. 27, §1, et seq., as well as subsequent enabling legislation, 37 Okl. Stat. §§501, et seq., were very strict and comprehensive in their regulation of alcoholic beverages.

⁶ "The rising toll of alcohol problems has been paralleled in the last two decades by greatly increased alcohol advertising and by increased consumption of alcohol." Michael Jacobson, George Hacker, and Robert Atkins, *The Booze Merchants*, CSPI Books, Washington, D.C.

encourage excessive drinking and have an impact on the values and behavior of consumers.⁷

Television advertising is a particularly effective means for increasing the consumption of alcoholic beverages. The wine industry certainly recognizes this fact. In 1981, a total of 130.1 million dollars were spent for wine advertising on television.⁸ This reflected a 378 percent increase over the money spent in 1970.⁹ The increase in television advertising of wine has worked. From 1970 to 1980 there has been a sixty-five percent increase in wine consumption.¹⁰ Perhaps it was because of success like this that "[wine] advertising on television jumped by 30 percent in the first nine months of 1982 compared to 1981."¹¹ Wine consumption in 1980 was 2.08 gallons per person.¹² Experts claim that this rate should be able to be increased to a total of four gallons per capita in 1990.¹³ Through the use of recently adopted marketing strategies aimed toward competition with non-alcoholic beverages,¹⁴ in conjunction with television advertising, the prediction of further increased consumption may become a reality.

Not only is television advertising an effective means of increasing the consumption of alcoholic beverages such as wine, it also constitutes a means whereby high per capita consumption levels may be maintained in the future. "The primary attention of marketers appears focused on heavy drinkers, young people, and special categories such as blacks, women, and people who do not like the taste of alcohol."¹⁵ When targeting these particular groups, television is a useful tool because an advertiser can simultaneously utilize both audio and visual techniques. A person does not have to be able to read to

⁷ *The Booze Merchants*, at 6 referring to a study done by Charles Atkin and Martin Block, *Content and Effect of Alcoholic Beverage Advertising*, Michigan State University, 1980. Prepared for the Bureau of Alcohol, Tobacco and Firearms, Federal Trade Commission, Department of Transportation and NIAAA.

⁸ *The Booze Merchants*, at 3.

⁹ *The Booze Merchants*, at 3.

¹⁰ *The Booze Merchants*, at 3.

¹¹ *The Booze Merchants*, at 5, 6. See also, *Impact*, January 15, 1983.

¹² *The Booze Merchants*, at 3.

¹³ *The Booze Merchants*, at 19. See also, *Business Week*, "Creating a Mass Market for Wine," March 15, 1983.

¹⁴ *The Booze Merchants*, at 87. See also, Gavin Jobson Associates, *The Wine Marketing Handbook*, 1979. New York, New York.

¹⁵ *The Booze Merchants*, at 23.

be influenced by the advertising. Television, therefore, has the potential of being an effective means for influencing young people. Incidentally, much of the alcohol advertising on television is done while children and teenagers are watching.¹⁶ Children are no doubt led to "believe that drinking is a part of grown-up life."¹⁷ It has further been suggested that "some marketing practices indicate a conscious effort to make alcohol a way of life for people nearing the legal drinking age."¹⁸ It has been through these techniques that companies have attempted to assure a future market for alcoholic beverages at high per capita levels of consumption.

Generally, the states are allowed to exercise a large degree of discretion in the means they employ to protect their people from the evils incident to intoxicants. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 139 (1939). Oklahoma has exercised this discretion by adopting laws which reflect a clear intent to prevent and discourage activity which would promote the consumption of alcoholic beverages. It is submitted that the ban on alcohol advertising, and particularly as applied to television advertising, represents a rational and reasonable means for asserting the State's objective of inhibiting the consumption of alcohol.

B. OKLAHOMA'S BAN ON THE RETRANSMISSION BY CABLE OF ALCOHOL ADVERTISING SHOULD PREVAIL WHEN TWENTY-FIRST AMENDMENT CONSIDERATIONS ARE WEIGHED AGAINST FIRST AMENDMENT AND SUPREMACY CLAUSE ISSUES.

The Twenty-first Amendment to the United States Constitution "has been recognized as conferring something more than the normal state authority over public health, welfare and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). The regulatory powers given the states under the Twenty-first Amendment have been also recognized as broad. *Larkin v. Grendel's Den, Inc.*, _____ U.S. _____, 103 S. Ct. 505 (1982); *California v. LaRue*, 409 U.S. 114. "Wide latitude" has been afforded the states in choosing the methods to be used to "accomplish a permissible end." *California v. LaRue*, 409

¹⁶ *The Booze Merchants*, at 72.

¹⁷ *The Booze Merchants*, at 71.

¹⁸ *The Booze Merchants*, at 49.

U.S. 116. Furthermore, the state's power to control the "transportation on importation" of liquor within their boundaries derived from the Twenty-first Amendment "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol". *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). Therefore, it should reasonably be concluded that the advertising of alcoholic beverages may be banned or strictly curtailed by a state.

The strength of this reasoning is however challenged when the advertising sought to be banned is mandated by federal law¹⁹ and arguably comes into conflict with First Amendment²⁰ as well as Supremacy Clause²¹ considerations. Whenever Twenty-first Amendment concerns have presented a potential conflict with concerns arising from other provisions of the United States Constitution, this Court has examined the circumstances surrounding the alleged conflict.²² Implicit in the Court's decisions has been a certain weighing and balancing of constitutional interests²³ and, in two cases involving a potential conflict between First Amendment and Twenty-first Amendment interests the Court has found circumstances to weigh more heavily on the side of the Twenty-first Amendments interests. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

The circumstances of the case now before the Court are varied and somewhat unique. Cable television systems as they exist today are a relatively recent innovation due in part to rapid technical advances which include satellite communications. With these innovations have come new opportunities to advertise and market products more efficiently on a nationwide basis. As a result government agencies such as the Federal Communications Commission (FCC)

¹⁹ 47 U.S.C. §115 (a); 17 U.S.C. 111 (e) (3)

²⁰ U.S. Const., First Amendment.

²¹ U.S. Const. Art. VI, cl. 2.

²² See e. g., *Larkin v. Grendel's Den, Inc.*, ____ U.S. ____ , 103 S. Ct. 505 (1982); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *California v. LaRue*, 409 U.S. 109 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

²³ *Id.*, See specifically, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717 quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) as follows: "In *LaRue*, however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing" [Emphasis added].

have responded with regulations to smooth the transition from primarily broadcast television to a mixture of cable and broadcast services. In doing so attempts have been made to formulate regulations which accommodate the economic needs of the industry. One such attempt has been the FCC's so called "must carry rule". 47 C.F.R. §§76.57, 76.59, 76.61.

In each of the FCC's must carry rules the operative phase, "any such community unit may carry or request of the relevant station licensee or permittee, shall carry the signals. . ." This rule has the appearance of being rooted primarily in the realm of economic considerations.

Although the policy of the FCC may be to ensure that the benefits of cable communication become a reality nationwide this policy should not dictate the manner in which a state exercises its regulatory duties under the Twenty-first Amendment. Congress and Federal Commissions should not be able to legislate away for reasons of regulatory convenience and industry economics, a state's control over the consumption of alcoholic beverages.²⁴ The First Amendment and Congress through the Supremacy Clause should not be allowed to so seriously circumvent a state's Twenty-first Amendment powers as is attempted in this case.

Another circumstance which deserves consideration is the claim that if cable operations were required to delete alcohol advertising from their programming, they would be so economically damaged as to prevent the distribution of communication which is protected by the First Amendment. The above reasoning of necessity assumes certain economic and technological facts. It assumes both currently and in the future, the technology required to delete advertising will either be unavailable or will be so expensive as to present an impossibility. Neither of these facts have been proven, nor should they be assumed. No one has ever proven that the deletion of alcohol advertising is actually impossible. It is common knowledge that electronic technology is an extremely fast changing field. Technologies which are available but expensive today may become cheap and readily available. Technology and economics do not provide a sound basis for decision.

²⁴ See also, 17 U.S.C. 111 (c)3 which sets up copyright barriers to the deletion of advertising.

Furthermore, there is no way to tell what the actual impact would be on the availability of cable television programming in Oklahoma should the ban on advertising be upheld. There is no testimony as to what has happened when cable operations are required to delete advertising because this has never happened. The federal lawsuits were brought quickly and stay invoked which have deprived the Courts of these important facts save those arrived at through speculation. The impact on cable television of an alcohol advertising ban is a fact question which has never been satisfactorily resolved.

A decision involving the health, welfare and safety of Oklahoma's residents should not turn on what is merely practical or economical for an industry. In this case, the Court is asked to balance the interest of the State in protecting its residents against the pecuniary interests of certain advertisers, broadcasters and cable operators. Even if it were possible to show that protected First Amendment rights were being effected, we would submit that when a balance is sought between physical well-being and intellectual well-being, the former should more often prevail. Physical well-being should be considered a fundamental concern.

Accordingly, we urge the Court to find that Oklahoma's ban on the retransmission by cable companies of television advertising for alcoholic beverages should prevail when Twenty-first Amendment considerations are weighed against First Amendment and Supremacy Clause issues.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be upheld.

Respectfully submitted,

Larry Derryberry
DERRYBERRY DUNCAN GRAY & QUIGLEY
4420 N. Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 424-5535